Office Supreme Court U. S.
FILED
NOV 15 1899
JAMES H. McKENNEY,
Clerk.

No. 80.

Reply Brief of Niles for Appellant

Filed Nov. 15, 1899

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 80.

GERTRUDE JAMES NILES, APPELLANT,

vs.

CEDAR POINT CLUB.

REPLY FOR APPELLANT.

In Supplemental Brief

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The brief of counsel for Appellee The Cedar Point Club is certainly remarkable.

It commences by substantially admitting that the facts are correctly stated in Appellant's brief.

It is not questioned that Ambrose Rice, Deputy U. S. Surveyor, surveyed and meandered the eleven fractional sections patented to Margaret Bailey in 1844, now owned by the appellant Gertrude James Niles, under which patents she claims the premises in controversy, precisely as every deputy surveyor is required by the present manual of instructions to deputy surveyors, to survey and meander every section made fractional by a meanderable body of water, and precisely as every fractional section has been surveyed and meandered.

These instructions are given on page one of our brief and were strictly complied with by Mr. Rice showing that he was acting under similar instructions. That is, Mr. Rice run the section lines of each of these eleven fractional sections to an impassable body of water extending from section 22, township 9, south range 9 east, to section 11, township 10, south range 10 east, and beyond, and set stakes at the edge of this body of water, "as meander corners." He then commenced where the west line of section 22, struck Maumee Bay and run his meander line from meander corner to meander corner through the eleven fractional sections, to and including section 11, township 10, range 10, where he struck what he calls the "inundated marsh of Lake Erie," which was too deep to permit any survey of any part of sections 12 and 13, beyond sections 11 and 14 where his survey ends.

It is not questioned that Rice set his meander corners at the bank or edge of this "impassable marsh covered with water," and that he surveyed every foot of land that he could or should have surveyed, and which he was not precluded from surveying by the presence of this "impassable water."

It is admitted that Robert Lytle the surveyor general platted the premises in controversy as a meanderable body of water designated as "impassable marsh covered with water" on the copies of these plats which were offered by the Appellee itself in evidence numbered 65, 66 and 67, (see record immediately preceding page 47) which plats show the premises in controversy and all of them as an open body of water, open to Maumee Bay, which is part of Lake Erie for a mile and a half on the west and connected with and part of what Rice calls in his notes page 15, paragraph 18, of record, "the inundated marsh of Lake Erie" through which the waters of the Lake had a free passage from Lake to Bay back of Cedar, Sandy and Crane islands.

It is not contended or even suggested that there was any mistake in the field notes or plats, the sole ground in all reported cases, for the claim that the meander line is ever a boundary, and in the absence of which all the courts hold that field notes and plats by which land is sold are not only presumptive but conclusive evidence of the facts they purport to show.

This conclusive showing from the field notes and plats, which counsel admit are as much part of the Bailey patents as if copied into them; that the premises in controversy were in 1834 and 1835, when Rice made his survey, part of Lake Erie, counsel attempt to overcome by three things:

1. By dictionary and encyclopedia definitions of the word "marsh."

It is enough to say of these definitions that both field notes and plats conclusively show that the premises in controversy were not a mere marsh in the dictionary sense, but a body of water so deep that it could not be passed over and the land under it could not be surveyed on account of the permanent presence of this water during the years 1834 and 1835 while Rice was making his survey.

The term marsh was undoubtedly applied to these premises, because on account of the protection afforded by the islands from the north-east storms aquatic vegetation grew upon them.

If Rice had found the premises in controversy in 1834 and 1835 as Marston found them in 1881, forty-six years afterward, and as the Court below describes them "a low swampy body of land partly boggy, partly dry," he would unquestionably have surveyed them as Marston did, and certainly no man with an ordinary knowledge of the English language would have designated a narrow sand strip separating such a body of land from the open waters of the lake as islands in Lake Erie, as they appear on plats 59, 60 and 61, immediately following page 46 of the record.

2. But counsel make much of a stipulation in the agreed statement that during the years 1834 and 1835 the waters of Lake Erie were above their usual level.

It would seem probable that this stipulation was inadvertantly admitted, as the history of the country makes it certain that neither party could know anything about the stages of water in the lake before that date, and the admitted fact that after that date Sandy and Crane Islands were washed inshore show conclusively that the waters of the lake must have been very considerably higher to give its waves the mighty sweep and power required to wash these islands, seven miles long and eight or ten rods wide, as we compute, 90 rods inshore. (See Stip. 17, page 30 Rec.)

This change is shown on the plats offered by the Appellee, numbered 65, 66 and 67, above referred to, where the islands shown on plats 59, 60 and 61 are shown as mere sand ridges through one township marked by a single black line.

From this stipulation that in 1834 and 1835 the lake was above its usual level, and from the further stipulation that in 1893, 1894 and 1895 when it is admitted the premises in controversy were dry, an unusual drouth prevailed in the Great Lake basin, Counsel and the court below make the surprising leap to the conclusion that for the sixty years between these periods the premises in controversy were at an ordinary stage, what Marston found them in 1881, forty-six years after the first period and fourteen years before the last.

The cause of the drouth in 1893, 1894 and 1895 is perfectly well known and has been acting with increasing force for the last fifty years.

It is the wholesale destruction of the timber in what was in 1834 and 1835 the great north-western wilderness, and which, if continued, by reducing the rain fall will seriously interfere with the productiveness of this great granery of the world.

Its progress is most clearly traced in this record by the gradual lowering of the lake level from the time soon after Rice's survey when it swept the islands 90 rods inshore to 1876, when the Supreme Court of Ohio after hearing most voluminous evidence found that the lake at a low stage maintained six inches of water over the premises in controversy, and to 1881 when Marston surveyed all of them and found no water line upon them, and up to the commencement of this suit in 1896 when it is admitted they were dry and according to the bill of complaint were farmed in a large way by the defendants.

But taking this stipulation as it stands in connection with the second stipulation (p. 13 Record), that Rice was engaged in this survey during the years 1834 and 1835, under a contract made in 1833, and plats 59, 60 and 61 following page 46 of the record, which show a continuous water line extending three miles along Maumee Bay, which is a part of Lake Erie, and continued without a break for eleven miles along the southwest margin of the premises in controversy to what Rice calls the "inundated marsh of Lake Erie," at the end of Section 11, T. 10, S. R. 10 E., which inundated marsh of Lake Erie is entirely open to the lake, the fact that these premises during those two years were covered by the lake and that the meander line was the southwest margin of Lake Erie is established.

When we add to this the further fact that these plats show a continuous water line all around Cedar, Sandy and Crane islands, which are distinctly shown as islands in Lake Erie, this evidence becomes complete.

The possibility that land separated the premises in controversy from Maumee Bay is excluded by the light dotted line on plat 59, marking the junction of the open bay for a mile and a half with the body of water called marsh, which being protected from the northeast storms aquatic vegetation grew upon it. But this demonstration that during these two years Rice was engaged in this survey all the premises in controversy were part of Lake Erie is supplemented and made absolutely conclusive by the copies of the Lytle plats offered by the Appellee, the Cedar Point Club from the records of the office of the Surveyor of Lucas County, made evidence by the laws of Ohio.

These plats are numbered 65, 66 and 67, and are given immediately before page 47 of the Record and on them all the premises are marked as "impassable marsh covered with water," entirely open to the lake at both ends. This conclusive proof that for two years all the premises in controversy were covered by Lake Erie, and that their south-western edge was the shore of Lake Erie cannot be swept aside by the suggestion of the Court below that this was a

mere temporary condition, even if it had been proved that immediately after Rice's survey was completed the water fell instead of it being admitted as it is on page 30 that instead of falling, the water rose so as to wash "Sandy and Crane Islands shoreward."

This period of two years, during which this high water continued, is far too long to be the result of temporary causes, or what the Supreme Court of Ohio, in fixing the line of riparian owners on the lake, calls "disturbing causes." It could only have been produced by causes effecting the Great Lake basin acting for some time before these two years, and which must have continued to act some time afterwards, as we know they did, to cause the even higher water which swept away these islands.

Nothing is better known than that great bodies of water like the chain of great lakes do not change their level in a day or month or year, but require long periods for any substantial change and what the Supreme Court of Ohio found in 1876 is what might be expected that the feet of water covering these premises in 1834 and 1835 had been reduced to inches in 1876, and that these inches disappeared in 1881, when Marston made his survey, leaving "a low, swampy body of land, partly boggy, partly dry," and that this swampy land should become great hay and plow fields in 1896.

This is precisely what the wholesale destruction of timber and the diminished rainfall and the greater absorption and evaporation through the Great Lakes basin would lead us to expect, and what this record conclusively proves, has taken place.

If the premises were at the time of Rice's survey part of Lake Erie, they could not have been reserved by the United States, and the title of the Cedar Point Club must fail as the court below admit "without reference to the goodness or badness of the appellant's title," for this court in Illinois Central Railroad Co. vs. Illinois, 146 U. S. 387, and in many other cases, has held that the land under the water of the Great Lakes belongs to the state in which it is situated.

The Supreme Court of Ohio in Sloan vs. Baymiller, 34 O. S., 492, holds that the boundary of riparian owners on Lake Erie is "the line at which the water usually stands when free from disturbing causes" and this line must of necessity advance or recede as the water rises or falls, and there can be no difference between the rights of the United States as riparian proprietor and the rights of its grantees.

Whether the water of the lake was above its ordinary level in 1834 and 1835 or not, counsel practically admit that during those two years they covered the premises in controversy, and the government selected those years to settle the question of what was lake and what was land, or in other words, what belonged to the United States and what to the State of Ohio, and nothing is plainer than that by the patents to Margaret Bailey which date back to the time of the survey, the United States transferred to her any rights it might have gained by the receding of the lake, as it imposed on her any loss that might result from the rising of the lake level.

It is clear beyond question that in 1881 these premises had ceased to be part of Lake Erie, and we fully agree with the court below.

that "by no stretch of the imagination could any court conclude that the low, swampy body of land, partly boggy, partly dry," which Marston found in 1881, "was so continuously under the water of the great lake as to be part of it."

It is equally plain that when Rice made his survey in 1834 and 1835 it was so continuously under the water of Lake Erie as to be unsurveyable and impassable, and by the same reasoning part of it, and "the bank along the south edge of this impassable marsh covered with water" meandered by Rice was then, as the Supreme Court of Ohio says in James vs. Howell, "the shore of Lake Erie," and as the water, as it stood along that bank at the time of Rice's survey when "free from disturbing causes," was the line of the United States as riparian proprietor, and as the United States transferred its rights as riparian proprietor to Margaret Bailey, and as the water of the lake had so far receded before Marston's survey in 1881, as to leave no part of these premises "so continuously under the water of the lake as to be part of it," and especially as before the commencement of this suit the waters of the lake had so far receded as to leave the premises dry and not subject to the overflow and capable of ordinary farming without any protection, we see no escape from the conclusion that the line of the appellant has followed these receding waters, and that her title to the premises is unquestionable.

3. But counsel quote with much satisfaction from a forgotten brief of one of the counsel for the Appellant filed as counsel for James in James vs. Howell, 41 O. S. 696.

Though not very high authority in this Court that brief is significant on this.

It clearly shows that counsel understood that Rice's survey and Lytle's plats showing the premises in controversy as part of Lake Erie must be shown to be mistakes or it must be proved that the Lake had so far receded that they were no part of it in 1876, and that when Sandy and Crane islands were patented to Howell as islands, they were no longer in any proper sense islands in Lake Erie.

When this case was tried in 1876 witnesses could have been called who had been familiar with the premises from the time of Rice's survey and it is to be presumed that counsel with this necessity before him would have called all who would take his view of the subject and with what result :

The Court say on the bottom of page 708 : "According to the evidence put in by James and Howell, at a low stage of water there is six inches of water in the marsh and more in the straits." On page 710 the Court further say, "But as already stated that evidence establishes the permanent presence of water between the islands and James meander line ; that this water was maintained there by the lake, and for the purpose of constituting a boundary under the Act of 1796, was part of the lake.

It is true the channel between the meander line and the islands was not navigable, but that, in our view, is immaterial. The Statute does not say "navigable water" or "navigable channel," but "naviga-

ble rivers"; hence when a river itself is navigable, the government surveyor may treat any part of such river as a boundary as well a part that will not permit the passage of a boat as those deep enough to float the largest vessels.

"Rice and Lytle treated the bank along the south edge of the so-called "impassable marsh covered with water" as the shore of the lake, the marsh as part of the lake, and Cedar, Sandy and Crane Islands as islands in the lake. It does not appear that the Commissioner of the Land Office disapproved of their actions." *Ibid* 711.

That is, the Court not only found that the premises in controversy were treated by Rice and Lytle as part of Lake Erie in 1834 and 1835, but that in 1876, after the wholesale distruction of timber in the Great North-west for a quarter of a century, with the necessary diminution of rain fall and the lowering of the lake level they were still part of the lake.

That counsel for James considered himself fairly beaten is evident from the fact that while this Court was open to him to seek a reversal he did not seek it, as from our knowledge of him he certainly would have done if he had seen a reasonable chance for success.

But counsel claim that "the title of the Federal Government is more absolute than that of an individual can be" and that while grants are to be strictly construed as against the private grantor, "the opposite is the rule applied to the grant of the Government." Under this claim they insist that while quantity or number of acres in an ordinary deed, "is regarded as a mere matter of discription, something by which the premises are to be identified but not as a limitation upon the quantity or an extension of the quantity but merely as one of the incidents of discription, yet in a Government patent it is to be regarded as a matter of essential discription."

This conclusion of counsel results from confounding two things only alike in name. That is the trust title by which the United States holds the waters of the country for the protection of navigation and the title by which public lands are held merely for transfer to private owners.

Grants by the Government in derrogation of the public right of navigation like the grant of a right to bridge a navigable stream must of course be strictly construed, and the grantee can only claim what is expressly and clearly granted.

All the reasons for this rule as applied to grants by the King, apply with equal force to such grants.

But to apply this rule to the transfer of public land to private owners approaches the absurd.

Every reason for construing a grant most strongly against the grantor applies with especial force to such a grant.

Every step in the transaction and every word in the patent is the work of the skilled agents of the Government over whom the patentees have no control.

The idea that such a document should be construed in favor of the grantor, acting through the most skillful agents and against the unskilled and powerless grantee, is little less than monstrous and is not the law as laid down by the courts.

This Court, in Hardin vs. Jordan, 140 U. S. 383, quotes with approval the following language of the Supreme Court of Illinois: "Where the Government has not reserved any right or interest that might pass by the grant nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorable for the grantee, and that it intended all that might pass by it."

But the court below assumes "that there is no doubt" that the United States, in the person of Deputy Surveyor Rice, showed its intention to reserve the premises in controversy by running the meander line on their south-west margin. We show from Rice's field notes that he did precisely what every Deputy Surveyor is required to do, and has done, in meandering every fractional section ever surveyed, and show by the reason of the case and by an overwhelming preponderance of authorities, that in running this meander line Rice was the mere instrument of the law in locating a natural boundary, and the mere agent of the land office in ascertaining the amount of land to be paid for.

Again we find from the official correspondence of the land office, offered in evidence and given in the record commencing on page 33, that in 1850, under the swamp land act of that year, the State of Ohio demanded the land in controversy as swamp land, which claim was passed upon by the land office and rejected in these words, "not swamp land and nearly all sold."

It appears from the letter of the land commissioner to Hon. John Sherman, dated January 23, 1872, that this ruling was persisted in up to that date, as it was up to 1876, when Sandy and Crane islands were sold to Howell as islands, the Lytle plats being made part of his patents.

Counsel admit that the reason for this ruling of the land office, that the premises in controversy were not "swamp land," was because they were "so under the dominion of the lake that they could not be reclaimed by dykes or levees." In other words, that they were not swamp lands but part of Lake Erie.

They say on the bottom of page 8 of brief: "This marsh was not at the time of Rice's survey or at the taking effect of the swamp land act, and is not now capable of reclaimation from the humidity arising from their being nearly on the same level with the adjoining waters of the lake, nor from temporary inundations by the water of the lake otherwise than by permanent and substantial lowering of the lake or prevention of the gales from the northeast rolling its high waves upon them, either of which is a project the swamp land act did not contemplate."

In support of this they give this fair statement of the ruling of this court in United States vs. Louisiana 127 U. S., 182, as to the purpose of the act: "The purpose was to enable the States to reclaim the land by drainage, or levees to prevent overflow."

In 1834 and 1835 when Rice found a well defined shore of Lake Erie along the south-west margin of this "impassable marsh covered with water" and especially afterward when the water of the lake had so risen as to give its waves the mighty sweep and power to wash Sandy and Crane islands, seven miles long and eight or ten rods wide, in shore as is admitted in the agreed statement (paragraph 17, page 30 of record) as we compute 90 rods it would of course have been idle to build dykes or levees against the high waves raised by the north-east gales" as they would have been swept away as fast as built, but there is not a word in this record that even tends to show that at the time of Marston's survey or at any time since, it would have been difficult or expensive to reclaim them.

Indeed the burden of the bill of complaint in this case is that "the defendants have cut and removed large quantities of hay, also have caused to be placed, herded and pastured, a large number of horses and cattle, to-wit, several hundred; and have plowed and planted thereon."

In other words the bill of complaint shows that the lake had so far receded that these premises could be used in a large way for ordinary farming without any protection from the lake.

The ruling that they were "nearly all sold" when nothing had been sold except by the Bailey patents in connection with the subsequent sales of the islands in 1861 and 1876 to Norton and Howell can only be construed as a disclaimer of any title of the United States after the Bailey patents except in the islands, or in other words to a distinct declaration that the premises in controversy were part of Lake Erie and not land belonging to the United States.

Yet this Court is now seriously asked to find in the face of this disclaimer by the highest official of the land office from 1850 to 1876, of any title in this "impassable marsh covered with water," that during all this time the Government was the owner of this whole territory having reserved it by the act of Rice in running a meander line along what he undoubtedly considered the shore of Lake Erie.

But even if these premises were not at the time of Rice's survey part of Lake Erie they are conclusively shown by the Rice field notes and the Lytle plats to have been a meanderable body of water or a shallow lake or pond.

In that case the title would not be in the United States but in the State.

This Court in Hardin vs. Jordan, 140 U. S. 380 says; "It has been the practice of the Government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity

of upland to be paid for, no charge being made for the land under the bed of the stream or *other body of water.*

The meander lines run along or near the margin of such water are run for the purpose of ascertaining the quantity of upland to be paid for and not for the purpose of limiting the grant to such meander line.

It has never been held that the land under water in front of such grants is reserved to the United States or can afterwards be granted to others to the injury of the original grantees."

It has repeatedly been held by this Court that the only difference between land under the great Lakes and other bodies of water, is that land under the Great Lakes is held by the State in perpetual and in alienable trust, while it is for the State Courts to say whether the land under other bodies of water shall be held by the State or the riparian proprietors.

The Supreme Court of Ohio by a long line of decisions, commencing with 3 O. 496, decided in 1828, and ending with the late case of Lembeck vs. Nye, 47 O. S. 336 has uniformly held that the land under all water in the State except Lake Erie belongs to the riparian proprietors, which in the case at bar would be the appellant as successor to Margaret Bailey and the successors of Norton and Howell patentees of the islands to be divided between them according to the rules of law.

The cases cited by counsel to establish the proposition that the Rice meander line was run as a boundary and was an exception to the admitted rule that the meander line is not a line of boundary are certainly remarkable. No question of a meander line is involved in Bernheart vs. Ernhart, 54 Pac. 195, or in Brown vs Clemons 3 Howard 650, or in Gazzam vs. Phillips, 20 Howard 372, the three cases most largely dwelt on. The only question involved in Bernheart vs. Ernhart is whether the boundary of an Indian Reserve named in a treaty or the line run in the survey of that reserve, approved by the land office is to be treated by the courts as the true boundary.

This court in Stoneroad vs. Stoneroad 158 U. S., 240, held that when it was necessary to locate land covered by outstanding titles in order to survey and sell the adjoining public land, Congress had charged the land office with its survey and location on the ground, and that its action unless modified or corrected on appeal was final and could not be questioned by the courts, even when shown to be erroneous.

In Bernheart vs. Ernhart the Umatilla Indian Reserve by the treaty was bounded by Red Horse Creek. This reserve was surveyed in 1865 and resurveyed in 1871, and the survey approved in 1872, and the line in front of the premises involved departed so far from Red Horse Creek as to leave 152.76 acres between the surveyed and platted line of the Indian Reserve and Red Horse Creek.

The plaintiff's title came from patents adopting the plat showing the surveyed line of the reserve as one of his boundaries.

Under this patent for the land bounded on one side by the surveyed line of the Indian Reserve, the plaintiff claimed the 152.76 acres between that line and Red Horse Creek, the treaty line of the Reserve.

The Court held that the surveyed line of the Indian boundary, as laid down on the plat made part of the patent, was the boundary of the grant.

This is the whole case, and it is evident the plaintiff might as well have claimed the land outside of any of the other lines shown on the plat as boundaries of his grant as outside the line of the Indian Reserve as surveyed and platted.

It is needless to follow this rambling opinion further, as there was no meander line in any way involved.

Brown vs. Clement, 3 Howard 650, was this: Section 22 was made fractional by older grants, which left 203.17 acres in the southwest corner belonging to the government. This was divided into two lots under a circular of instructions sent out by the Secretary of the Treasury, one containing 92.67 acres and the other 110.50 acres.

The only question was whether the Secretary of the Treasury had power to authorize such a division, or whether the law requiring the division of the public lands into sections and the subdivisions of sections pointed out by the law was mandatory and must be followed in all cases.

The majority of the Court held that the Secretary of the Treasury had no such power, while the minority held the discretion exercised was given by the Act of 1820. In Gazzam vs. Phillips, 20 Howard, 372, the same question came up involving the same land, and the whole Court held with the minority in the first case, that the law gave the Secretary of the Treasury discretion to depart from the rigid rule of subdivisions in such a case as that at bar, and the first ruling was reversed.

There is no suggestion that any one from the deputy surveyor up to the Secretary of the Treasury had any power to depart from the sub-division of the public lands into sections and their legal sub-divisions unless older boundaries or natural boundaries rendered such departure necessary except as it was given in the law itself.

How this finding that the law itself gave the Secretary of the Treasury power to direct a different sub-division of the public land in a specific case where it would manifestly make the land more saleable and more available to the purchaser can be construed into authority in a deputy surveyor to divide three townships of Government land by a zigzag line running eleven miles through their entire length, which is utterly unknown to the law, we fail to see.

The claim of the Cedar Point Club rests upon the broad ground, as stated in the pleadings, and as found by the court below that the premises in controversy were not at the time of Rice's survey, part of Lake Erie or a shallow lake or pond but were a "low, swampy body of land, partly boggy and partly dry," belonging to the Government as much as the dry land on the other side of the meander line did. No

wonder the court below says: "It would be useless to speculate as to the reason that induced Rice to make the border of the marsh the boundary of the fractions bordering thereon."

If the premises in controversy were part of Lake Erie then the law made the water line the boundary, and all Rice had to do was to point out the sinuosities of the water as he did.

If Rice had been the proprietor of a military grant of a given number of acres and authorized to lay it off to suit himself we can well understand why he would want this line as a boundary, for the land on one side was valuable while the land on the other side was entirely worthless.

But that any sensible private owner should make such a division of his land or that any intelligent Government surveyor should make it, even if he had the power, is impossible to believe.

Counsel also make much of the case of Granger vs. Swarts, Woolworth Reports 88, which has for many years done service without avail in the briefs of nearly every lawyer who has claimed that the meander line in his especial case was a boundary. The substance of the case is in the following language of judge Miller's charge, on page 90.

"If between the meander line, which by the government survey was made one of the boundaries of the land sold to Walker and the bank of Rock River and Kosh Konong Lake there was at that time a body of swamp or waste land or flats on which timber and grass grew and horses and cattle could feed and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meander line.

On the other hand if *when the entries were made* the bank of the River and shore of the Lake at an ordinary stage of water were where this meander line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water or by accretion to the shore and bank, then it became the land of the defendant or Walker, as the title might lie in one or the other."

It will be noticed that in the first supposed case and in all others where the meander line is claimed as a boundary, the meander line itself is a pure blunder of the surveyor and does not show the real sinuosities of the body of water represented as meandered.

It would seem singular that a mistake of a deputy surveyor would enable him to inject into our land system a line utterly alien both to its letter and spirit, when no one of the judges in the two cases in Howard just considered intimated that the Secretary of the Treasury himself had any authority to depart from the letter of the statutes except as the authority was given him by the law itself in a special case where it would be manifestly for the benefit both of the government and the purchaser.

But this opinion of Judge Miller as it stands applied to the case at bar would be conclusive in favor of the Appellant.

It is not contended or even suggested that Rice's meander line departed at any point from the water line as it existed at the time his survey was made, on the contrary counsel for Appellee claim as a stipulated fact that it was "identical" with it.

The possibility of the growth of timber and grass or that cattle or horses fed and hay could be cut on any of the premises in controversy is excluded by the fact conclusively shown by the field notes of Rice and Lytle plats that they were all so covered with water as to be impassable and to render such growth impossible.

The true rule when a surveyor makes such a mistake as is supposed by Judge Miller is undoubtedly laid down by the Supreme Court of Indiana in Stoner vs. Rice, 121 Ind., 52, and of Michigan in Palmer vs. Dodds, 64 Mich., 475, and in a case quoted with approval by this court in Horn vs. Smith, 159 U. S. 40.

This court in that case say:

"Whitney vs. Detroit Lumber Co., 78 Wis., 240, was a case in which the meander line shown on the government survey was a half a mile or more from the real boundary of the Lake and the court in a very careful opinion discusses the law of official surveys and holds that as the *meander line was a mistake* the patent did not convey the land to the actual boundary of the Lake but to *the straight line which would have been the boundary of the quarter section if accurately surveyed.*"

This rule applied to every case where the surveyor by mistake did not show the true meander line would relieve this much discussed question of every difficulty.

It would preserve the fundamental principles of our land system, the best system ever devised; better than the Roman system, that all public lands shall be divided by north and south and east and west lines except in the language of the law, "an Indian boundary or an older boundary or a navigable stream" renders this impossible.

It would strictly conform to the terms of the grant and remove the supposed necessity of making the meander line a boundary to prevent extending the grant beyond what either party contemplated in case of great mistakes by the surveyor.

It is in harmony with the liberal policy of the Government in dealing with public lands in giving the patentee rather more land than he expected where he is deprived of the natural boundary represented on the plat which in many cases would add greatly to the value of the land, by the blunder of the Government officials.

This rule applied to the case at bar, if we are to adopt the strange conclusion of the court below that the premises in controversy were not part of Lake Erie as the field notes and plats represent them in 1834-1835, but what Marston found them forty-six years afterwards would give the appellant precisely what the Margaret Bailey patents call for—these eleven fractional sections, extended as the law commands they shall be extended, and as Marston extended them and not one acre more.

Counsel also refer to Lammers vs. Nissen, 4 Nebraska, 245, another standby of those who claim the meander line, in their particular case, is an exception to the admitted rule that the meander line is not a line of boundary, and Glen vs. Jeffries, 75 Iowa, 20. Both of these cases are precisely alike and identical with Horn vs. Smith, 159 U. S., 41. In each case a bayou or slough was meandered and in the two first cases called by mistake the Missouri river, and in the last case the Indian river, which stream in each case was a mile or more away and separated from it by a mile or more of land.

The body of water actually meandered being a lawful boundary, a mere mistake in naming it could not of course extend the grant beyond this natural boundary and far beyond the legal boundary of the fraction granted extended to its limits.

This court in the last case in express words declare the meander line was not the boundary line, but the stream meandered was.

Counsel also refer to the case of Grant vs. Hemphill 59 (Iowa), N. W. 233. But the Supreme Court of Iowa in the later case of Schlosser vs. Crinkshanks 65, N. W. 344, carefully review this case and all Iowa cases referred to and hold that the meander line is never a line of boundary, quoting 28 cases, state and federal in support of this proposition.

In that case the court did not limit the grant to the legal boundary of the parcel granted as above proposed but extend it to the body of water purporting to be meandered although it was proved that at the time of the survey there was more dry land outside than inside of the meander line.

The court below do great injustice to Mr. Justice Harlan by quoting from a letter to counsel and resting their opinion upon the quotation as an opinion handed down by the learned judge.

The fact is, Mr. Justice Harlan handed down no opinion and did not hear the case. It was fully argued orally before Judge Ricks in the Circuit Court, who on account of sickness after some six months' delay handed the papers to Mr. Justice Harlan for decree. He kindly offered to hear counsel in the evening during the session of the Supreme Court, but as the case was certain to be appealed, and as the object of both sides was to get the case forward, council for appellant declined to add to his labors. That he considered his decision as formal is shown by the fact that he added to the decree prepared by counsel the grant of an appeal and fixed the amount of the bond at the nominal sum of $250.

HENRY T. NILES
AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

No. 80.

Reply Brf. of Niles for Appt.

NOV 16 1899
JAMES H. MCKENNEY,

Filed Nov. 16, 1899.

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 80.

GERTRUDE JAMES NILES, APPELLANT,

vs.

CEDAR POINT CLUB.

Reply for Appellant to Supplemental Brief.

HENRY T. NILES AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-15-'99

We admit to its fullest extent the first proposition in appellee's supplemental brief, that the Rice-Lytle plats are as much a part of the Bailey, Norton and Howells patents as if copied into them and it is therefore unnecessary to consider the cases cited in its support. We go even further and say that the Government having presented those plats to the purchaser as a true representation of the condition of the premises to be sold, and having by reference incorporated those plats in the instrument of conveyance as such representation, and the purchaser having accepted them as such, on the plainest principles would be estopped from denying their truth in the absence of clear proof of fraud or mistake.

This is undoubtedly the broad ground on which this court, in Horne *vs.* Smith, 159 U. S., 40, held that the existence of a water line shown on a plat cannot, in the face of the plat, be claimed not to have existed as shown.

It would seem unquestionable, on principle and authority both, that when no fraud or mistake was even suggested, as in this case, and when, as in this case, the transaction involving the truthfulness of the showing of the plats had been acquiesced in by both parties for forty-six years, or up to the date of the Marston survey in 1881, that anything shown by the survey or plats on their face or by fair inference cannot be questioned by either party.

We could have no criticism, unless verbal, to make as to the law of accretion or reliction as laid down by counsel for appellee, and this record supplies all the facts required by it.

To apply this law, or rather rule of reliction, to any given case it must appear that land which was submerged with substantial permanence has by the subsiding of the water ceased to be submerged with equal permanence; but it strikes us that under the evidence shown by this record the appellee is clearly estopped from denying that the premises in controversy were submerged with substantial permanence at the time of Rice's survey, and that it had ceased to be so submerged at the time of Marston's survey in 1881.

The first requirement of the circular under which the Marston survey was made, and which the appellee offers in evidence as authority for the survey under which appellee claims, is that it must be shown that the premises asked to be surveyed were "the beds of lakes (not navigable), sloughs, and ponds over which

the lines of the public survey were not extended at the date of the original survey, but which, from the presence of water at the date of such survey, were meandered;" and the second is that "by evaporation or the operation of any other causes, natural or artificial, the waters of such lake, slough, or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit in ordinary seasons for agricultural purposes."

Before a survey could be ordered under this circular of these premises it must have been made to appear to the satisfaction of the land office that at the time of the original survey the land was so covered with water that it could not be surveyed, and was therefore meandered, and that the water had so far subsided as to leave the land dry and fit in ordinary seasons for agricultural purposes, and the last fact must be established by sworn testimony produced by the party desiring the survey.

It is a most extraordinary proposition that appellee can claim under a survey based on the finding of the land office that the premises in controversy were at the time of Rice's survey covered with a meanderable body of water, and at the same time claim it was a mere swamp or marsh, in the ordinary sense of those words, or, as the court below find, "a body of low swampy land, partly boggy and partly dry," which could and should have been surveyed as Marston surveyed it.

It would be, if possible, still more remarkable to allow the appellee to claim under a survey based on evidence that in 1881 the water of this lake, slough, or pond had so permanently retired as to leave the land formerly covered by it in an ordinary season fit for agricultural purposes, and at the same time to deny, as counsel sometimes seem to do, that it had so retired, especially in the face of the stipulation that for some time before the commencement of this suit it was dry, and the allegation of appellee's bill that the defendants had been continuously and largely using the premises in controversy for ordinary farming purposes.

We see no pertinence in the case so largely quoted from Louisiana, as that was as clearly a case of annual flooding and subsidence as the valley of the Nile, and we do not see how any question of either accretion or reliction could arise in such a case.

But, on a broader ground, we see no reason to enter into the learning, not to say subtleties, of the books on the subject of accretion and reliction.

This is because the supreme court of Ohio has, as we think, wisely

entirely eliminated such questions from the real-estate law of that State.

If the premises in controversy were at the time of Rice's survey part of Lake Erie, as we think the survey and plats conclusively show, then, as is admitted by the court below, they belonged to the State, and could not be reserved by the United States. Being the property of the State, it is clearly for the State to fix the line of riparian owners bordering upon it.

One of the ablest judges who ever sat on the Ohio supreme bench, recognizing the fact that the Great Lakes, like the ocean, are laws unto themselves, and that no great or sudden changes ever affect them, except such as are the result of temporary disturbing causes, fixed the line of the riparian proprietor "at the line at which the water usually stands when free from disturbing causes."

Sloan *vs.* Baymiller, 34 O. S., 492.

If the water rises, the riparian proprietor must of necessity retire before it. If it retires, the State, instead of claiming the little space left uncovered at any one time, which would lead to endless confusion, with no practical good, gives it to the riparian proprietor as compensation for the possible loss from having such a troublesome neighbor.

Under this rule the line of the Bailey grants must of necessity have followed the receding waters of Lake Erie, being at all times as those waters stood when free from disturbing causes, and it is absolutely immaterial whether this retirement was gradual, as this record shows it was, or by more sudden changes, which from the nature of these great bodies of water could not be the case.

If, on the other hand, the body of water meandered by Rice was not part of Lake Erie, but any other body of meanderable water, as it most certainly was, and must have been found to be before the Marston survey could have been ordered, then this court settled the question in Hardin *vs.* Jordan, 140 U. S., 383, that the land under it was not reserved by the United States, but that it belonged to the State courts to decide whether it should be held by the State or turned over to the riparian proprietor.

The courts of Ohio by a long line of decisions, commencing with Gavitt *vs.* Chambers, 3 O., 496, decided in 1828, and ending with the late case of Limbeck *vs.* Nye, 47 O. S., 336, has held that the land under all water in Ohio, except Lake Erie, belongs to the riparian proprietor.

In this case it would be utterly immaterial whether the retirement of the water was gradual or rapid, as it would merely retire from the riparian proprietor's own land.

The cases quoted from Missouri and Texas have no application to the case at bar, as in each case the premises to which the accretion or addition is claimed had fixed lines run on the ground by metes and bounds, and are not additions claimed on a meander line or riparian boundary.

The case from the land office cannot apply for the reason that in that case the plat showed two meander lines, and the land office ordered a new survey, as it, of course, would, while in this case the meander lines are distinctly the meander line of Bailey fractional sections on one side and the islands on the other, and they nowhere meet, being separated on the west end for a mile and a half by the open water of what is called on the plats offered by the appellee "impassable marsh and water," and on the east end for three-quarters of a mile by what Rice in his field-notes, on page 15 of record, calls the "inundated marsh of Lake Erie," which the plats offered by both sides (61 and 67) show is entirely open to Lake Erie.

The case of Toledo Liberal Shooting Club *vs.* Erie Shooting Club, 90 Fed. Rep., 680, is only significant in this, that while the United States granted to the State of Michigan 4,000 acres as swamp land, under the Swamp Land act of 1850, they refused to grant the premises in controversy, only some five or six miles east of the Michigan grant, to Ohio, and the Government must be presumed to have had a good reason in the nature of the premises for the grant in the one case and refusal in the other, and the only conceivable reason is that the Michigan grant was swamp land and the other refused to Ohio was not what counsel and the court below call it, "a mere marsh or swamp," or, as the court below describes it, "a body of low, swampy land, partly boggy and partly dry;" and this, taken in connection with the declaration that it was nearly all sold by the Bailey grants in connection with the subsequent sales to Norton & Howells of the islands, containing only 127.90 acres, can only be construed as a distinct disclaimer of any title in the premises in controversy claimed by the State and containing, according to the Government showing, 6,000 acres, though this has been reduced to a little over 4,000 acres by the washing in of the islands.

We take no especial exception to counsel's statement of the

ground of appellant's claim except the clause "and at the time the surveyed land was conveyed by the Government in 1844." All patents for public land, of which a Government plat is made part, must of necessity date back to the time the plat was made.

The patents for the eleven fractional sections patented to Margarett Bailey in 1844, and Cedar island, patented to Norton in 1861, and Sandy and Crane islands, patented to Howells in 1876, of which patents the Lyttle plats are made part, as the appellee well says in the commencement of his supplemental brief, "as fully and to the same extent, to all intents and purposes, as if embodied in such patent," must of necessity rest upon the state of facts shown by the plats; otherwise we might have ten different states of facts to consider in ten different patents issued in ten succeeding years, of all of which one plat showing one state of facts is a part.

With this exception, we have no criticism of counsel's statement, which, omitting the above clause, would read as follows:

"The facts which counsel for appellant are driven to claim as constituting a foundation for appellant's contention are that this more than 4,000 acres of surface area between the surveyed lines of the lands patented to appellant's ancestor on the one side and the so-called islands on the other was at the time of the survey in 1834 and 1835 with substantial permanency a body of water such as the laws and regulations governing surveys of public lands authorized to be omitted from survey and sale; and that since that time its character has changed to that of substantial permanent land sufficiently discharged of water to become and be a proper subject of private ownership."

The fact that the premises in controversy were at the time of Rice's survey such a body of water as the laws and regulations governing the survey of public land authorized to be omitted from survey and sale is proved:

1st. By the fact that it was so omitted from survey and sale by the deputy surveyor, whose action was approved by the surveyor general and the Land Office, and that this omission was persisted in up to 1876, when Sandy and Crane islands were patented to Howells, and the Lyttle plats made part of his patent.

2d. Even if the correctness of the plats were questioned, which they are not, Rice's field-notes show that he surveyed every foot of land whose survey was not prevented by the presence during two years of "impassable water," which of course makes the land under it unsurveyable.

3d. By the finding of the Land Office on the demand of the premises by Ohio as swamp land, which necessarily involved a hearing and examination of the facts that they are not swamp land, but as late as 1852 were "deep marsh, covered with water," and that they were nearly all sold by the Bailey patents, with the subsequent sale to Norton and Howells of the islands, only containing 127.90 acres. This language, "nearly all sold," would unquestionably have been changed to all sold if the sale of the islands had been made before this hearing.

This can only be construed into a declaration that the premises in controversy did not belong to the Government, but were a meanderable body of water.

4th. By the solemn finding of the supreme court of Ohio, on fuller evidence than this court or any other court can ever have, that the meander line run by Rice was run along the shore of Lake Erie, and that the water between this line and the islands was part of Lake Erie, and that, notwithstanding the wholesale destruction of the timber in the Great Lake basin for twenty-five years and the necessary lowering of the lake, that the premises in controversy were still part of Lake Erie, which maintained upon them at least six inches of water when the lake was lowest, down to 1876, when that case was tried. In opposition to this array of evidence, what does appellee offer to prove that these premises were not a meanderable body of water at the time of Rice's survey, either in his original or supplemental brief?

Nothing—absolutely nothing—but their naked assertion that they were a mere marsh or swamp.

With all their skill and diligence, not one word of evidence was offered on the hearing of this case or can be found in the record to support this naked assertion.

As to the last clause of this statement, "that since that time (that is, since Rice's survey) its character has changed to that of substantial, permanent land, sufficiently discharged from water to become and be a proper subject of private ownership," we prove:

1st. By the fact that under the circular the Marston survey could only have been ordered on sworn proof to the satisfaction of the Land Office that these premises had become dry land, fit in an ordinary season for agricultural purposes;" and this evidence produced by the parties asking the survey under which appellee claims.

2d. By the Marston survey and plats offered by appellee, which show affirmatively that he surveyed the whole of these premises and found no water line upon them, and his statement, which is made part of the agreed statement, that he found no water standing upon them except in pond holes, and no water coming upon them except the drainage of the upland, which was substantially the same as in 1834 and 1835, and what was driven upon them by high northeast winds, a purely temporary disturbing cause, which could only last a few days.

3d. The stipulation (page 30 of Record) that "the major portion of these premises was dry during the summer of 1895."

4th. The allegations of appellee's bill that "the said defendants" (naming them), "combining and confederating together, have repeatedly entered upon said premises, well knowing the facts aforesaid, and have cut and removed therefrom large quantities of hay; also have caused to be placed, herded, and pastured thereon a large number of horses and cattle, to wit, several hundred head, and have also plowed and planted thereon."

We assert without fear of contradiction that there is not one scintilla of evidence in this whole record that even tends to prove that the premises in controversy or any part of them have been covered with water with any permanence or at all except from rainfall or from the temporary spreading of the drainage from the upland, in time of heavy rains, since the Marston survey in 1881.

When we consider the learning and diligence of counsel for the appellee and the time they have had for investigation, the fact that so little evidence was produced at the trial and so little law is found in their brief or supplemental brief to controvert any of the positions made in behalf of appellant is proof positive that such evidence could not be procured and that such law does not exist.

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